MISCELLANY.

What about Your Handwriting?—Humor develops in the sordid atmosphere of the court room every now and then. Clashes between expert witnesses and skillful lawyers frequently develop situations which turn the entire trend of a judicial hearing. In Los Angeles recently Milton Carlson, the nationally known handwriting expert, and examiner of questioned documents, turned the tables upon Horace Appel, noted criminal lawyer, and caused an uproar in Judge Willis court room.

This particular incident occurred during the trial of David Caplan, who was associated with the McNamara brothers in the dynamiting of the Times building. These cases were of international importance. The question of handwriting was one of the pivotal points at issue. Carlson was the sole expert relied upon by the prosecution in the Caplan case. Appel was defending the accused.

In the course of his testimony Carlson made the statement that the opinion of handwriting experts is superior to another person's opinion of his own handwriting.

"Do you mean to say, Mr. Expert, that you know more about my handwriting than I do," said the astute Appel.

"I have said that the opinion of an expert is frequently of more weight than the opinion of the person who wrote the questioned writing," replied Carlson in his suave and polite tone.

Appel waited for several minutes and then produced a paper on which a number of sentences in apparently different handwriting appeared.

"Now Mr. Expert, can you tell me if one person wrote this, and how many pens were used?" Appel said, handing the expert a paper containing several different sentences.

Carlson examined the writing for a moment and said that he would like time to examine it. Appel granted this and Carlson took the writing to his office.

After the noon recess Carlson, who had imitated the questioned document, so that he could discourse upon it, returned to court. Inadvertently Carlson left the paper which he had written in imitation before Deputy District Attorney Doran and Attorney Appel.

When Appel started cross examination he picked up this paper, studied it, apparently recognized it and then said:

"Mr. Expert witness how many people wrote this paper?"

Carlson reached for the paper, recognized it at once as the imitation and answered positively:

"One person wrote this and he wrote it with one pen."

"Are you sure?" queried Appel.

"Absolutely," replied the expert witness.

"I will prove that it was written with two pens. I wrote it my-

self in this court room," shouted Appel as he dashed through the court room and secured two pens.

Judge Willis then pointed out to Carlson that he had made a positive statement and Carlson again re-iterated that he was positive in his statement.

Appel refused to cross examine. Just as Carlson started to leave the stand Deputy Doran queried: "How do you know one person wrote these statements, Mr. Carlson, and that one pen was used?"

"Because," replied the witness, "I wrote them myself with one pen in my office at noon. Mr. Appel did not recognize his own handwriting. This incident may tend to prove what I said that sometimes handwriting experts know more about questioned writing than the person who wrote it."

As Carlson explained that he had roughly imitated the writing given to him by Appel so that he could more readily argue to the jury the court room attendants began laughing. Judge Willis and Bailiff Aguierre joined in the laughter.—Los Angeles Review.

Right of Free Speech—Labor Controversy.—In Stephens *v.* Ohio State Telephone Co., 240 Fed. 759, the court said:

"The right of free speech does not give any one the privilege to force his views upon others, to compel others to listen. The right of others to listen or to decline to listen is as sacred as that of free speech. It is clear that, if one does not desire speech of another, he may as surely have his privacy therefrom as the privacy of his home. It is undeniable that the socalled right of peaceful persuasion may be lawfully exercised only upon those who are willing to listen to the persuasive arguments.

"Again, every man has the right to the pursuit of his lawful business or employment undisturbed, and any act performed with intent to disturb the full and unrestrained exercise of his faculties and wishes in such employment is plainly unlawful.

"Again, he has the right of privacy and freedom from molestation of private persons, hostile or otherwise, at his home, at his lodging, at his place of work; he has the right to walk the streets without annoyance from the unwelcome attentions of others, so long as he is conducting himself in a lawful manner.

"Again, the right of one man to work is as much entitled to respect as the right of another to cease work or to strike.

"Again, the right of an employer to engage whomsoever he chooses is as strong as the right of an employee to refuse to work.

"It is a safe and proper generalization that any action having in it the element of intimidation, or coercion, or abuse, physical or verbal, or of invasion of rights of privacy, when not performed under sanctions of law by those lawfully empowered to enforce the

law, is unlawful; every act, of speech, of gesture, or of conduct, which 'any fair-minded man' may reasonably judge to be intended to convey insult, threat, or annoyance to another, or to work assault or abuse upon him, is unlawful. Not a syllable of the Clayron Act, or of any other law, whether of legislation of Congress or of the common law, sanctions any of the incidents we have referred to. They are to be condemned as legally inexcusable; such must be the verdict of 'any fair-minded man;' nothing can be said in justification.

"These propositions are so elemental that, but for the confusion which exists in many minds that a labor controversy affects the commonest rules of life, it would seem a waste of time to state them. The existence of a strike does not make that lawful which would otherwise be unlawful. These personal rights to which we have alluded are, in each instance, precisely those which the striker himself would insist upon were conditions reversed. They are also so plain, and the answers to the questions involving them so certain, that one called upon to enforce the law, if he has but ordinary intelligence, will plainly fail to do his duty when in his presence a fellow citizen suffers an invasion of his rights of this character."

A Government's Liability for Brigandage against Aliens.—The *Jenkins* case in Mexico has served to produce considerable difference of opinion between the Department of State on the one hand and certain newspaper editors, on the other, as to the liability of Mexico for the acts of the bandits who seized and held Jenkins, an American consular agent at Puebla, for a large ransom. The newspapers urged an immediate ultimatum and the exaction of redress from the Mexican Government; the State Department was more disposed to follow legal principles. The second phase of the case, namely, the alleged malicious prosecution of Jenkins by the Mexican Government, involves a different principle, to be discussed presently.

It seems that Jenkins was taken from his house by several bandits who held him about a week for the ransom which Jenkins' attorney ultimately paid. The newspapers urged that the Mexican Government be forced immediately to repay the ransom and to pay an indemnity for the injury to Jenkins. The State Department stated that such demands could only be made if the negligence of the Mexican Government could be shown. The case is not without precedents, and it may be of interest to discuss it from the point of view of international law.

Individuals, whether singly or in groups or in mobs, are not authorities of the State whose torts upon aliens immediately engage the responsibility of the Government. To bring that about there must be some independent delinquency of the Government itself, a

failure, after opportunity afforded, either to prevent the injury or to punish the guilty. A government is not, as is so often assumed, a guarantor of the security of aliens. Under ordinary circumstances, it is merely under a duty to furnish governmental machinery which normally would protect the alien in his person and property. This does not mean that this machinery must be so efficient as to prevent all injury to aliens, but merely that it must be so organized that a violent assault by one individual upon another is only a fortuitous event and that under the particular circumstances all reasonable measures have been taken to prevent the injury and punish the guilty. As a corollary to this principle, a government's duty and consequent responsibility for breach are measured by its *ability* to protect the alien in a given case.[1] Commissioner Wadsworth in the United States-Mexican arbitration of 1868 expressed the opinion that the test of a nation's responsibility for injuries committed upon aliens in its territory by private persons, is the enforcement of the laws "with reasonable vigor and promptness to prevent violence when practicable, or failing in that to punish the offenders criminally, or to indemnify the injured party by (its) remedial civil justice."[2]

To render the Government liable, therefore, it has been deemed necessary for the claimant to prove some manifestation of actual or implied governmental complicity in the act, before or after it, either by directly ratifying or approving it,[3] or by an implied, tacit or constructive approval in the negligent failure to use "due diligence" to prevent the injury,[4] or to investigate the case, or to prosecute and punish the guilty individuals,[5] or to enable the victim to pursue his

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1. Bowley (U. S.) *v.* Costa Rica, July 2, 1860, Moore's Arb. 3032; Calvo, Droit international (6th ed.) sec. 1274, makes the "facilities at hand" the test of responsibility. Mr. Hay, Sec'y of State, to Mr. Dudley, Min. to Peru, Sept. 5, 1899, 6 Moore's Dig. 806. But the apprehension and punishment of the guilty will be demanded. Borchard, *Diplomatic Protection of Citizens Abroad* (1915) secs. 86, 87.

2. Mills (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 3034.

3. Kane's notes on arbitration convention with France, 1831. Phila., 1836, p. 31. Piedras Negras claims (Mexico) *v.* United States, July 4, 1868, Moore's Arb. 3035.

4. Hubbell et al. *v.* United States (1879) 15 Ct. Cl. 546 (Chinese indemnity); Alabama claim (U. S.) *v.* Great Britain, May 8, 1871, 6 Moore's Dig. 999; Evertsz (Netherlands) *v.* Venezuela, Feb. 28, 1903, Ralston, 904. The recent case of "Pussyfoot" Johnson in London, where the police without resistance, it seems, permitted a mob to assault this individual, illustrates the rule of governmental liability.

5. De Brissot (U. S.) *v.* Venezuela, Dec. 5, 1885, Moore's Arb. 2868; Poggioli (Italy) *v.* Venezuela, Feb. 13, 1903, Ralston, 869; Renton claim *v.* Honduras, For. Rel. 1904, p. 363 (refusal to diligently prosecute and punish). Incidental grounds would be: inadequate punishment (Lenz claim *v.* Turkey, Mr. Hay, Sec'y of State, to Mr. Strauss, Mar. 25, 1899, For. Rel. 1899, p. 766); negligently permitting

civil remedies against the offenders.[6]

The "due diligence" rule, of which a few applications have been enumerated, naturally depends upon the circumstances of the case, and is sometimes expressed by the phrase that "ability is the test of responsibility." In the *Jenkins* case, in order to hold Mexico liable for the ransom, it would be necessary to show either that Mexico had had warning of the presence of bandits, as in the *Baldwin* case[7] in 1887, and had failed, though having the opportunity, to take reasonable police precautions to prevent the kidnapping or to apprehend the marauders, or that some other want of "due diligence" is imputable to her.[8] In better organized states this "diligence" has been measured by the Government's "ability" in the particular circumstances.

Notwithstanding this general rule, cases have not been infrequent where a more rigorous test of liability has been imposed, notably against more poorly organized or weak states like China, Turkey, Morocco and formerly Greece. Here liability for assaults by private individuals has been predicated, not on any imputed governmental complicity or negligence, but on the mere failure to prevent the injury.[9] Disregarding thus a certain assumption of risk on the part of an alien in visiting notoriously unstable countries or regions, the local government is apparently placed in the position of insurer of the safety of aliens, at least of those that can claim the citizenship of powerful countries. The weaker countries, notwithstanding their lesser ability to protect aliens, are thus held to a higher degree of responsibility for their safety than strong states. This departure from principle has been strongly influenced by that factor in international relations which weights arguments according to the physical power of their proponents.

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offender to escape (Lenz and Renton cases, supra); inexcusable delay in investigating the facts (Ruden [U. S.] *v.* Peru, Dec. 4, 1868, Moore's Arb. 1655).

6. Unjustifiable pardon to the offenders (Montijo [U. S.] *v.* Colombia, Aug. 17, 1874. Moore's Arb. 1421, 1444). Cotesworth and Powell (Gt. Brit.) *v.* Colombia, Dec. 14, 1872, ibid., 2050, 2085.

7. Baldwin claim *v.* Mexico, 1887, 6 Moore's Dig. 801.

8. Marauders in Peru, 1899, 6 Moore's Dig. 806; Case of Miss Ellen Stone in Turkey, For. Rel. 1902, 997-1023. Inasmuch as Jenkins was taken from his house in a populous city like Puebla, the presumption of negligence against Mexico is much stronger than if the capture had been made in an unsettled region. This factor was emphasized in 1907 by the British government in its demand on Turkey for reimbursement of the ransom paid for the release of Robert Abbott. Reimbursement of ransoms paid has been demanded from defendant governments when actual or implied complicity or negligence has been alleged, e. g., in the failure to take proper steps to suppress brigandage. Synge and Sutor cases (Gt. Brit.) *v.* Turkey, in 1881, 72 St. Pap. 1167. Borchard, op. cit., secs. 88, 171.

9. Numerous cases of private murder of aliens in China, reported

While a consular agent is usually only a local resident business man who exercises minor consular functions, he has, nevertheless, been deemed to be entitled to a measure of special protection by the local authorities not enjoyed by the ordinary private alien.[10] His official position alone, however, should not serve to make the local government an insurer of his safety, although that doubtless renders it more difficult for the government to overcome the presumption of negligence ordinarily attaching to a notorious act of brigandage in a populous town.

The second phase of the *Jenkins* case involved his arrest on the charge, subsequently dropped, of collusion with his captors, and the later charge that he had committed perjury in the course of the judicial proceedings. The State Department, which must have evidence that has not been made public, has taken the position that the charge of perjury is without foundation, prompted by malice against Jenkins, and has demanded his "immediate release." We shall leave aside the incidental questions raised concerning Mexican constitutional law in the matter of the separation of powers and removal of causes. It is a fundamental principle that every nation, whenever its laws are violated by anyone owing obedience to them, whether citizen or alien, is privileged, free from interference by other states, to inflict the penalties incurred by the transgressor if found within its jurisdiction, provided that the laws themselves, the

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in For. Rel. 1880. Japanese subjects murdered in China, 1874, Moore's Arb. 4857; Dreyfus, Arbitrage international, 176, 177; Lieut. Cooper claim (Gt. Brit.) *v.* Turkey, 1888, 81 St. Pap. 178; Caldera (U. S.) *v.* China, Nov. 8, 1858, Moore's Arb. 4629; Hubbell *v.* United States, supra (based principally on treaty obligations); Russia *v.* Turkey, 1826 (Turkey held liable for depredations of Moorish pirates) 13 St. Pap. 899, 16 St. Pap. 647, 657. Five cases of British subjects injured in Greece, about 1850, by acts of individuals, Baty, 116-118; Marcos *v.* Morocco, 1900 (1901) 28 Clunet, 205. Murder of Italian soldier in Crete, 1906 (1907) 1 A. J. I. L. 158; (1906) 13 R. G. D. I. P. 223; Montijo (U. S.) *v.* Colombia, Aug. 17, 1874, Moore's Arb. 1421ff. (absence of power considered equivalent to omission to use it). Turkey and Morocco held responsible for acts of pirates from their shores on three occasions, (1905) 12 R. G. D. I. P. 563-565. "Insufficiency of the protective measures afforded," an alleged ground of liability in certain cases in Turkey, For. Rel. 1897, p. 592.

10. Attacks on German consulate in Havre, 1888, in Messina, 1888, and in Warsaw, 1901 (1889) 16 Clunet 250; Borchard, op. cit., secs. 86, 90. French and German consuls murdered in Salonica, 1876, 67 St. Pap. 917; 5 Moore's Dig. sec. 704, discusses cases in Venezuela, Peru, Nicaragua, Santo Domingo and United States. See the following authorities: Vattel, Chitty's ed., Bk. IV, ch. VI, sec. 75, p. 460; Phillimore, II, sec. 246, p. 263; Pradier-Fodéré, IV, sec. 2108.

But see case of Servian Vice-consul assassinated in Turkey, 1890, Baty, 224 and Wipperman (U. S.) *v.* Venezuela, Dec. 5, 1885, Moore's Arb. 3041, which were not taken out of the general rule of non-liability.

methods of administering them, and the penalties prescribed are not in derogation of modern standards of civilized justice.[11]

The criminal procedure of foreign countries frequently contains harsh features and is deficient in many safeguards which American law provides for the benefit of the accused. This constitutes no ground for diplomatic complaint, the right of the United States being confined to a demand that its citizens be given the full and fair benefit of the system which does exist, without discrimination in favor of natives or other aliens.[12] An alien must submit to the inconvenience of proceedings that may be brought in accordance with law upon any *bona fide* charge that an offense has been committed, even though the charge may not be sustained.[13] The issue in the *Jenkins* case arises on the point of the *bona fide* nature of the charge. The State Department evidently regards the arrest as without probable cause, and dictated by malice. If that is so, there is no doubt of the duty of Mexico to release him and to pay an indemnity.[14] Jenkins' original refusal to give bail and his subsequent release on bail given by another does not weaken his case—though it might reduce the indemnity—if his allegations of fact are sustained. But the facts are disputed by Mexico. The case is purely a matter of law and unless other considerations dictate another policy, it would seem that arbitration should be resorted to. Unless the United States is absolutely certain of the facts, and even if it is, the policy of self-help involves consequences conducive neither to the peace of the world nor to the orderly development of international law. It is one of the defects of international law that self-help is admitted as a legal method for redress of injuries, the plaintiff state constituting itself judge and sheriff. The political consequences of such measures, of course, cannot be predicated. Austria's insistence upon the privilege to resort to self-help in the redress of an alleged grievance against Servia brought about the World War.—Yale Law Journal.

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11. Mr. Marcy, Sec'y of State, to Mr. Jackson, charge at Vienna, Jan. 10, 1854, 2 Moore's Dig. 88; Ballis (U. S.) *v.* Venezuela, Feb. 13, 1903, Morris' Report, Sen. Doc. 317, 58th Cong. 2d sess., 375. Borchard, op. cit., sec. 42.

12. Mr. Marcy, Sec'y of State, to Mr. Jackson, Apr. 6, 1855, 2 Moore's Dig. 89; 6 ibid., 275. See also the illuminating opinions in In re Neely (1900, C. C. S. D. N. Y.) 103 Fed. 626 and in Neely *v.* Henkel (1901) 180 U. S. 109, 21 Sup. Ct. 302 (by Justice Harlan).

13. Elihu Root in (1910) 4 AM. J. INT. LAW, 527. Trumbull (Chile) *v.* United States, Aug. 7, 1892, Moore's Arb. 3255, and the following cases before the United States-Mexican commission of July 4, 1868: Collier (ibid. 3244), Atwood (ibid. 3249), Cramer (ibid. 3250). See also White (Gt. Brit.) *v.* Peru (1864) ibid. 4967 and "LaForte" (Gt. Brit.) *v.* Brazil (1863) ibid. 4925.

14. Jonan (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 3251; Pratt (Gt. Brit.) *v.* United States, May 8, 1871, ibid. 3280; Underhill (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston 45, 51.

Procedure Adopted in Exile of Napoleon.—The determination of the allies to bring the ex-Kaiser to trial before a specially constituted court sitting in London has sent many students to inquire what was the procedure adopted when, Waterloo having given the *coup de grace* to Napoleon, that monarch surrendered to the commander of the *Bellerophon*. In that case there was no semblance of a trial; the ex-Emperor was regarded as *hostis humanis generis* and at once deported to St. Helena. A curious project was indeed entertained of getting him brought on shore from the *Bellerophon* by the issue of a writ of *habeas corpus ad testificandum* on the pretence of some action in which he would be required as a witness, but it appears to be doubtful whether anything was in fact done, although it has been stated that Capel Lofft moved for the issue of the writ. It seems clear, however, that doubts must have been entertained regarding the regularity of the whole proceedings connected with his treatment, and the possibility of awkward questions relating thereto arising, for, in the statute that was passed "for regulating the intercourse with the island of St. Helena during the time Napoleon Buonaparté shall be detained there," a provision was inserted for completely indemnifying all persons connected with the detention of the ex-Emperor in respect of their acts. It has not been overlooked by critics of the British Government's treatment of the fallen foe that both in the Act just referred to and in that which immediately precedes it in the statute-book (56 Geo. 3, c. 22) the ex-Emperor is throughout described as "Napoleon Buonaparté" (except in one of the marginal notes, which in worse taste speaks of "N. Buonaparté") as if to deny, as Lord Rosebery has said, that he had ever been French at all. Most men are extremely sensitive on the subject of their names and titles, and Napoleon did not differ from his fellows in this respect. When, on landing at St. Helena, he received an invitation addressed to "General Bonaparte," he handed it over to one of his attendants with the remark, "Send this card to General Bonaparte; the last I heard of him was at the Pyramids and Mount Tabor." The petty persecution of the captive in this matter continued, and it is said that on his coffin plate no name appeared because Sir Hudson Lowe had refused to allow the simple inscription "Napoleon," insisting that "Bonaparte" must be added, and, as the ex-Emperor's suite refused to agree to this, the plate was left blank. Questions of this kind are, of course, more for the statesman than for the lawyer, whose only further interest in Napoleon when in custody is the fact, mentioned in a note to Forsyth's Cases and Opinions on Constitutional Law, that, arising out of his residence in St. Helena, a curious point was submitted to the law officers of the Crown. It seems that Napoleon was fond of ball practice and fired very carelessly, one day killing a bullock. Supposing he had killed a person, under circumstances which would

amount to manslaughter according to English law, what was to be done with him? An opinion was given, but unluckily Forsyth was unable to discover it. What could have been done if he had been tried and convicted of manslaughter?—Law Notes.

Common Law Not Refined.—In Peeples *v.* Georgia Iron, etc., Co., 248 Fed. 886, 891, the court said: "The common law is a product of more vigor than refinement. It encourages independence and self-reliance. The development of equity has made modifications in its crude vigor; but equity, as administered in the court, is the output of the same peoples who made the common law, and its principles have not yet reached the lofty ideals of early Christianity, nor even the refined justice of the civil law. The line between permissible overreaching and punishable fraud is illy defined, and so it has been from the time Jacob demonstrated the profitable potentialities of the science of eugenics at the expense of Laban, even unto this day. Genesis xxv, 31-43."

Skin of Living Thought.—In Towne *v.* Eisner, 245 U. S. 418, 425, Mr. Justice Holmes said: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

IN VACATION.

A Rule of Court.—A representative in Congress from a northwestern state tells of a youthful lawyer who had been retained to defend an old offender on the charge of burglary. The rules of the court allowed each side one hour in which to address the jury.

Just before his turn came the young lawyer consulted a veteran of the bar who was in the court room. "How much time," he asked, "do you think I should take in addressing the jury?"

"You ought to take the full hour."

"The full hour! Why, I thought I should take something like ten minutes!"

"You ought to take the full hour."

"Why?"

"Because the longer you talk, the longer you will keep your client out of jail."—Ex.